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11 **UNITED STATES DISTRICT COURT**
12 **SOUTHERN DISTRICT OF CALIFORNIA**

13 CALIFORNIA TRUCKING
14 ASSOCIATION, a California non-
15 profit corporation,

16 Plaintiff,

17 v.

18 JULIE SU, in her official capacity
19 as Labor Commissioner,

20 Defendant.

Case No. 16CV1866 CAB MDD

REPLY IN SUPPORT OF MOTION TO
DISMISS COMPLAINT FOR FAILURE
TO STATE A CLAIM
(FRCP 12 (b) (6))

Date: September 12, 2016

PER CHAMBERS, NO ORAL
ARGUMENT UNLESS ORDERED BY
THE COURT

21 **INTRODUCTION**

22 Plaintiff, California Trucking Association (“CTA”), presents an interpretation
23 of Federal Aviation Administration Authorization Act (“FAAAA”) preemption that is
24 not supported by any decision of the United States Supreme Court, that is totally at
25 odds with controlling Ninth Circuit precedent, and that has been explicitly rejected in
26 cases involving the precise issue presented here by two federal district courts in the
27 Ninth Circuit and by the California Supreme Court.

28 **ARGUMENT**

There is not a single decision of the United States Supreme Court construing the
FAAAA (or, for that matter, the Airline Deregulation Act) to preempt a generally

1 applicable state wage and hour law (whether founded upon statute or judicially created
2 common law) that is applied by a state to motor carriers (or airlines) in the exact same
3 way that it is applied to any other business operation and its workers. Not one.
4 Instead, we have cases concerning state efforts to regulate airlines' consumer
5 advertising (*Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992)), a claim
6 brought under a state consumer fraud law to enjoin an airline from devaluing the
7 benefits associated with its frequent flyer program (*American Airlines v. Wolens*, 513
8 U.S. 219 (1995)), a state law that operated to require a motor carrier delivering
9 tobacco products to verify that the person to whom the delivery is made is of legal age
10 to purchase tobacco (*Rowe v. New Hampshire Motor Transp. Assn.*, 552 U.S. 364
11 (2008), a lawsuit brought under a state's consumer protection act to recover damages
12 from a towing company that towed the plaintiff's car, and subsequently, disposed of
13 the vehicle without compensating the plaintiff (*Dan's City Used Cars, Inc. v. Pelkey*,
14 133 S.Ct. 1769 (2013), and finally, a lawsuit brought by an airline customer alleging
15 breach of the implied covenant of good faith and fair dealing stemming from the
16 airline's cancellation of his membership in a frequent flyer program (*Northwest, Inc.*
17 *v. Ginsberg*, 134 S.Ct. 1422 (2014)).

18 So when the CTA argues that "the Supreme Court has made clear state's [sic]
19 may not use their policy judgments, whether embodied in a consumer fraud law
20 (*Wolens*) or a covenant of good faith and fair dealing (*Ginsberg*), to alter or impair the
21 enforcement of contracts freely made in the marketplace" (MPAs In Opposition to
22 Motion to Dismiss, p. 11.), it is critical to understand that the contracts the Court is
23 referencing are *consumer* contracts with airlines, not contracts between an airline (or a
24 motor carrier) and its workers.

25 This Circuit has repeatedly rejected arguments advanced by motor carriers and
26 airlines that generally applicable employment laws are subject to FAAAA (or Airline
27 Deregulation Act) preemption. The Ninth Circuit first held that that the FAAAA does
28 not preempt the state's prevailing wage laws. (*Californians for Safe & Competitive*

1 *Dump Truck Transp. v. Mendonca*, 152 F.3d 1184 (9th Cir. 1998).) Next, it held that
 2 the Airline Deregulation Act does not preempt a generally applicable city anti-
 3 discrimination law. (*Air Transport Ass’n. v. City of San Francisco*, 266 F.3d 1064,
 4 1071 (9th Cir. 2001).) And then, it held that the FAAAA does not preempt the state’s
 5 meal and rest break laws. (*Dilts v. Penske Logistics, LLC*, 769 F.3d 637 (2014).)

6 CTA’s contention that the FAAA requires enforcement of contracts between
 7 motor carriers and their drivers, and prohibits the state from applying state law or state
 8 policy to “re-order” any provisions in such contracts, is fundamentally at odds with
 9 each of these Ninth Circuit cases. For example, under *Mendonca*, if the work
 10 performed is subject to the prevailing wage law, the motor carrier cannot rely on its
 11 contract with a driver to pay less than the prevailing wage; the requirements of the
 12 state prevailing wage law trump contractual provisions that establish a lower wage.
 13 That’s the basic premise behind minimum labor standards – these are wage and hour
 14 requirements that cannot be undercut by private agreement. (See, e.g., Labor Code §
 15 1774: “The contractor to whom the contract is awarded, and any subcontractor under
 16 him, shall pay not less than the specified prevailing rates of wages to all workmen
 17 employed in the execution of the contract.”)

18 Moreover, when it comes to *generally applicable* labor standards, there is
 19 simply no basis for FAAAA preemption: “[B]ecause the Prevailing Wage Law applies
 20 to *all* employers involved in public works, the fifty year-old Prevailing Wage Law
 21 cannot be construed as the state’s de facto attempt to regulate motor carriers as
 22 prohibited by section 14501 [of the FAAAA].” (*Californians for Safe & Competitive*
 23 *Dump Truck Transp. v. Mendonca*, 957 F.Supp.1121, 1129 (N.D. Cal. 1997), *aff’d* at
 24 152 F.3d 1184 (9th Cir. 1998).) “The [challenged] Ordinance is a broad law applying
 25 to hundreds of different industries.... It is not focused upon air carriers.” (*Air*
 26 *Transport Ass’n.*, 266 F.3d at 1072.) And in *Dilts*, the challenged meal and rest break
 27 laws “are normal background rules for almost *all* employers doing business in the
 28 state of California.” (*Dilts*, 769 F.3d at 647.) And here, CTA does not dispute the

1 fact that California's long-standing *Borello* multi-factor test to determine whether a
2 person hired to provide a service is an independent contractor or an employee is
3 generally applicable to *all* service arrangements and all industries in California; it is
4 not targeted at the motor carrier industry.

5 CTA argues that all of these Ninth Circuit cases can be ignored because all of
6 them involve "motor carriers who have *chosen* to use employees to transport freight,"
7 and "[t]he application of wage and hour laws to drivers who were hired as employees
8 is analytically distinct from using state law to upend ... contractual arrangements"
9 between drivers (referred to in those contracts as independent contractor "owner-
10 operators") and motor carriers. (MPAs In Opposition to Motion to Dismiss, p. 9.)
11 First, it's really not clear how "upending" a contract that says an employee who drives
12 a vehicle for a motor carrier will be paid an amount less than the state mandated
13 prevailing wage (a contract that the Ninth Circuit can be "upended" without running
14 into FAAAAA preemption) is any different than "upending" a contract that says this
15 driver is an independent contractor not entitled to payment of the prevailing wage.
16 CTA seems to think by entering into a contract that designates a driver as an
17 independent contractor, a motor carrier magically obtains FAAAAA immunity from all
18 of those state laws that the Ninth Circuit held not preempted by the FAAAAA, every
19 one of which protects persons who are employees under California law (whether
20 designated as such by their employers or improperly classified by their employers as
21 independent contractors). Surely, the FAAAAA was not intended by Congress to
22 facilitate such subterfuge.

23 Second, the Ninth Circuit has repeatedly explained that there was no
24 congressional intent, in enacting the FAAAAA, to preempt generally applicable state
25 employment laws; in distinction from the congressional intent to preempt claims
26 founded upon state consumer protection laws:

27 Laws are more likely to be preempted when they operate at the point
28 where carriers provide services to customers at specific prices....

1 *Morales* and *Mendonca* both stand for the proposition that the Airline
2 Deregulation Act and the FAAAA do not preempt laws that regulate ...
3 inputs [that] operate one or more steps away from the moment at which
4 the firm offers its customer a service for a particular price.... [G]enerally
5 applicable background regulations that are several steps removed from
6 prices, routes, or services, such as prevailing wage laws or safety
7 regulations, are not preempted even if employers must factor those
8 provisions into their decisions about the prices that they set, the routes
9 that they use, or the services that they provide. Such laws are not
10 preempted even if they raise the overall cost of doing business or require
11 a carrier to re-direct or reroute some equipment.... Nearly every form of
state regulation carries some cost. The statutory text tells us, though, that
in deregulating motor carriers and promoting maximum reliance on
market forces, Congress did not intend to exempt motor carriers from
every state regulatory scheme of general applicability. (*Dilts*, 769 F.3d at
646-647.)

12 There is, of course, nothing in the history of the enactment of the FAAAA that
13 reveals a Congressional intent to preempt generally applicable state law tests used to
14 determine, for purposes of the enforcement of state wage and hour laws, exactly who
15 is an employee protected by those laws. Indeed, it defies credulity to think that the
16 Ninth Circuit would find any such intent on the part of Congress, after having already
17 concluded (in *Mendonca* and *Dilts*) that Congress had no intent to exempt motor
18 carriers from wage and hour laws of general applicability.

19 This distinction between state wage and hour claims and consumer claims was
20 forcefully stated in *Costello v. BeavEx, Inc.*, 810 F.3d 1045 (7th Cir. 2016), in holding
21 that the Illinois Wage Payment and Collection Act, is not preempted by the FAAAA:

22 [T]here is a relevant distinction for purposes of FAAAA preemption
23 between generally applicable state laws that affect the carrier's
24 relationship with its customers and those that affect the carrier's
25 relationship with its workforce. Laws that affect the way a carrier
26 interacts with its customers fall squarely within the scope of FAAAA
27 preemption. Laws that merely govern a carrier's relationship with its
28 workforce, however, are often too tenuously connected to the carrier's
relationship *with its consumers* to warrant preemption. The Supreme
Court's preemption decisions do not counsel a different conclusion. (*Id.*,

1 at 1054.)

2 CTA fails to comprehend the significance of this distinction between generally
3 applicable state employment laws and consumer protection laws. As a consequence,
4 its reliance on *Northwest* is misplaced. There, the Supreme Court held that because an
5 airline customer's implied covenant of good faith and fair dealing claim "seeks to
6 enlarge his contractual agreement" with the airline, the claim is preempted by the
7 Airline Deregulation Act. (*Northwest*, 134 S.Ct. at 1433-1434.) The Court explained:
8 "When the law of a State does not authorize the parties to free themselves from the
9 covenant, a breach of covenant claim is preempted under the reasoning of *Wolens*."
10 (*Id.*, at 1432.)

11 CTA argues, based on *Northwest*, that because California law does not permit a
12 motor carrier and its drivers to "contract around" the *Borello* test, the state's use of the
13 *Borello* test is preempted by the FAAAA. But what can or cannot be "contracted
14 around" in regards to consumer claims that directly and substantially relate to an
15 airline's prices and services, and whether the Airline Deregulation Act preempts such
16 claims, has nothing whatsoever to do with determinations of employee status in
17 connection with the enforcement of generally applicable state wage and hour laws,
18 and nothing whatsoever to do with whether the FAAAA preempts the state from
19 enforcing its generally applicable wage and hour laws (or from making
20 determinations, under generally applicable state law, whether a worker is covered by
21 such laws).

22 CTA correctly states that the unanimous decision of the California Supreme
23 Court in *People ex rel. Harris v. Pac Anchor Transportation, Inc.*, 59 Cal.4th 772
24 (2014), *cert. denied* at 135 S.Ct. 1400 (2015), holding that the FAAAA does not
25 preempt a state law employee/independent contractor misclassification claim, is not
26 binding on this Court. Though not binding, the reasoning of this decision, extensively
27 discussed in our opening brief, is persuasive and firmly grounded upon the Ninth
28

1 Circuit's decision in *Mendonca*.

2 Moreover, there are two district court decisions in the Ninth Circuit that address
3 the same issue, and that have reached the same conclusion as that reached by the
4 California Supreme Court in *Harris*. The first, *Robles v. Comtrak Logistics, Inc.*,
5 2014 WL 7335316 (E.D. Cal. 2014), considered a motor carrier's FAAAAA preemption
6 challenge to a cause of action seeking a declaration that the motor carrier unlawfully
7 misclassified its drivers as independent contractors. The motor carrier argued that the
8 misclassification claims are an "attempt by Plaintiff dictate the terms of [Defendant's]
9 contractual relationships with its owner-operators," and are thus "preempted by the
10 FAAA Act." (*Id.*, at *4.) Like the CTA here, Comtrak relied on *American Trucking*
11 *Associations, Inc. v. City of Los Angeles*, 559 F.3d 1046 (9th Cir. 2009). Judge
12 Mendez found this reliance misplaced: "The FAC does not seek to *require* Defendant
13 to use only employee drivers rather than independently contracted drivers as
14 attempted in the [*American Trucking Associations*] action. Rather, it seeks to hold
15 Defendant accountable for its obligation to properly classify its drivers." (*Ibid.*)

16 Judge Mendez considered the *Harris* decision, finding its reasoning "persuasive
17 and concur[ring] in its holding that generally applicable laws regarding the
18 classification of employees are not the type of regulation Congress was attempting to
19 target in the passage of the FAAA Act, as they do not seek to regulate the 'intrastate
20 prices, routes, or services of motor carriers.'" (*Id.*, at *6.) The court made short work
21 of Comtrak's contention that *Northwest, Inc. v. Ginsberg* compels a finding of
22 FAAAAA preemption: "*Ginsberg* has little to no bearing on this case.... Defendant
23 strains to connect the reasoning therein to its contention here that Defendant should
24 not be subjected to California's generally applicable labor laws." (*Id.*, at *7.) Finally,
25 Judge Mendez characterized as "entirely unpersuasive" Comtrak's contention that
26 *Dilts* should not apply because it involved employee drivers rather than drivers
27 contractually designated as independent contractors. (*Id.*, at *8.)

28 *Comtrak* was followed by *Villalpando v. Exel Direct Inc.*, 2015 WL 5179486

1 (N.D. Cal. 2015), a wage and hour lawsuit stemming from the alleged
2 misclassification of delivery drivers as independent contractors rather than employees.
3 Exel argued that all of the drivers' claims were preempted by the FAAAA, because
4 they would have the effect of "requiring it to adopt a business model based on the use
5 of employees." (*Id.*, at *29.) The court, relying on *Mendonca, Dilts, and Harris*,
6 found no FAAAA preemption, reasoning: "Exel may adopt whatever business model
7 it wishes. What it cannot do is treat its drivers as employees while avoiding
8 California's wage and hour rules by requiring its drivers to enter into a contract that
9 simply *calls* the drivers independent contractors." (*Ibid.*)

10 Now CTA comes before this Court, asking for a declaration that the FAAAA
11 preempts the State Labor Commissioner from applying the generally applicable state
12 common law *Borello* test to determine, in the context of the Commissioner's
13 enforcement of generally applicable state wage and hour laws, whether drivers
14 working for motor carriers are employees (entitled to the protections of those wage
15 and hour laws) or independent contractors. CTA's claim simply fails as a matter of
16 controlling Ninth Circuit law.

17 Whether CTA's claim might succeed before the First Circuit is debatable; but
18 whether it can possibly succeed before the Ninth Circuit is not. CTA points to two
19 recently decided First Circuit cases that it contends support its claim – *Massachusetts*
20 *Delivery Association v. Coakley*, 769 F.3d 11 (1st Cir. 2014) and *Schwann v. FedEx*
21 *Ground Package System, Inc.*, 813 F.3d 429 (2016). In those cases, the First District
22 considered whether "Prong 2" of a recently enacted Massachusetts law that establishes
23 a three-part test to differentiate employees from independent contractors, is preempted
24 by the FAAAA. Under the Massachusetts law, a person performing any service is
25 considered to be an employee unless the requirements of each prong of the three-part
26 test are met: (1) the individual is free from control and direction in connection with
27 the performance of the service, both under his contract for the performance of the
28 service and in fact; *and* (2) the service is performed outside the usual course of the

1 business of the employer; *and*, (3) the individual is customarily engaged in an
2 independently established trade, occupation, profession, or business of the same
3 nature as that involved in the service performed. (*Schwann*, at 433.)

4 The First Circuit concluded that Prong 2 of this law is preempted by the
5 FAAAA, and that Prong 2 is severable from the other parts of the law, leaving Prongs
6 1 and 3 as the test in cases involving motor carriers and their drivers. The *Schwann*
7 court noted: “Prong 2 also stands as something of an anomaly because it makes any
8 person who performs a service within the usual course of the enterprise’s business an
9 employee for state wage and hour purposes. By contrast, under the federal Fair Labor
10 Standards Act, 29 U.S.C. §§ 201-219, and the laws of many states, the relationship
11 between the service performed and the usual course of the enterprise’s business is
12 simply one of many factors to be considered.” (*Id.*, at 438.)

13 Indeed, in California, under the *Borello* test, this factor is considered as just one
14 of fourteen separately identified factors to be considered, none of which is
15 determinative in isolation. It is not even considered to be the most important factor;
16 that designation going to the “right to control the manner and means of accomplishing
17 the result desired.” (*S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations*, 48
18 Cal.3d 341, 350-354.) So in Massachusetts, Prong 2 effectively prevents motor
19 carriers from using independent contractors as drivers (since driving is not “outside
20 the usual course of the business” of the motor carrier), while in California, the *Borello*
21 test does not preclude motor carriers from using the services of independent
22 contractors. Thus, it is difficult to see the applicability of these First Circuit cases to
23 the issue now before this Court. But whether applicable or not, *Coakley* and *Schwann*
24 set out the controlling law in the First Circuit, not the Ninth.

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CONCLUSION

For all of the reasons set forth herein, the State Labor Commissioner respectfully requests that the complaint herein be dismissed.

Dated: September 2, 2016

s/ Miles E. Locker

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